Supreme Court, U. S.
FILED
NOV 23 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-.....76-7251

HERBERT W. ARMSTRONG AND GARNER TED ARMSTRONG,
Petitioners,

vs.

MARGARET E. AIKEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

RALPH K. HELGE
RADER, HELGE & GERSON
Grosvenor Plaza, Suite 540
150 South Los Robles Avenue
Pasadena, California 91101

and

DONALD A. BURR
BURR, PEASE & KURTZ, INC.
825 West Eighth Avenue
Anchorage, Alaska 99501
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

Background Facts 3

REASONS FOR GRANTING THE WRIT 5

ARGUMENT 6

CONCLUSION 7

APPENDIX—

A. Order of the Supreme Court of Alaska 1a

B. Alaska Statute Section 09.05.015(a) 2a

C. Order of Superior Court for State of Alaska, Third Judicial District 6a

D. Affidavit of Herbert W. Armstrong 7a

E. Affidavit of Garner Ted Armstrong 11a

Table of Authorities

CASES

Block Industries v. *DHJ Industries, Inc.*, 495 F.2d 256 (8th Cir. 1974) 6

Hanson v. *Denckla*, 357 U.S. 235, 2 L.Ed.2d 1283 (1958) 7

International Shoe Co. v. *State of Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 6

Local No. 438 v. *Curry*, 371 U.S. 542, 9 L.Ed.2d 514, 83 S.Ct. 531 6
McNutt v. *General Motors Acceptance Corp.*, 298 U.S. 178 6
Mercantile Natl. Bank v. *Langdeau*, 371 U.S. 555, 9 L.Ed. 2d 523, 83 S.Ct. 520 (1963) 6
N.Y. Times Co. v. *Conner*, 365 F.2d 567 (5th Cir. 1966) 7
Pennoyer v. *Neff*, 95 U.S. 714, 24 L.Ed. 565 7
Rosenblatt v. *American Cyanamid Company*, 15 L.Ed.2d 39, 86 S.Ct. 1 (1965) 6
Taylor v. *Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967) 6
Walker v. *Savell*, 335 F.2d 536 (5th Cir. 1964) 7

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution—
First Amendment 2
Fourteenth Amendment 2
Alaska Statutes—
AS 09.05.015(a) 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-.....

HERBERT W. ARMSTRONG AND GARNER TED ARMSTRONG,
Petitioners,

vs.

MARGARET E. AIKEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF ALASKA

HERBERT W. ARMSTRONG and GARNER TED ARMSTRONG, the petitioners, pray that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Alaska entered herein on October 15, 1976, denying a petition for review, the basis of which was to quash service of summons on petitioners, California residents, under the Alaska long arm statute.

OPINIONS BELOW

No opinions were issued by the courts below.

JURISDICTION

The Judgment of the Supreme Court of Alaska was entered October 15, 1976 (Appendix A, page 1a). The jurisdiction of this court is invoked pursuant to 28 USC §1257(3).

QUESTIONS PRESENTED

The questions presented for review are as follows:

(1) When a complaint fails to allege facts that defendants had any contact with the state of Alaska, and the only evidence submitted is the unrefuted affidavits of the defendants evidencing no minimum contact, has the Alaska court, by denying a motion to quash service of summons, applied the Alaska long arm statute in violation of the Fourteenth Amendment of the United States Constitution and the decisions of this court construing the same?

(2) Who has the burden under the due process clause of the Fourteenth Amendment of the United States Constitution, of alleging and proving jurisdictional facts for *in personam* jurisdiction under a state long arm statute?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."

The Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Alaska long arm statute, AS Section 09.05.015(a).

Because the provisions of this statute are lengthy, the pertinent text is set forth in the Appendix as Appendix B, page 2a.

STATEMENT OF THE CASE

Petitioners seek review of a judgment of the Supreme Court for the State of Alaska denying their petition for review of an order of the Superior Court of the State of Alaska, Third Judicial District.

Petitioners had filed a motion to quash service of summons on them for lack of *in personam* jurisdiction in a case before the Superior Court of the State of Alaska. After a hearing, said court denied petitioners' motion (Appendix C, page 6a).

Background Facts

Respondent sued the Worldwide Church of God and three of its ministers, one who is an Alaska resident and two others, Herbert W. Armstrong and Garner Ted Armstrong who were California residents and the petitioners herein.

The complaint charged that the petitioners, in their capacity as ministers, alienated the affections of respondent's husband by advocating one of the teachings of the Worldwide Church of God, ". . . that if a first marriage is a valid marriage, the couple cannot obtain a 'scriptural divorce.'"

The complaint did not allege that the petitioners committed any act in Alaska or that they had any minimum contact therewith.

Former local counsel for petitioners filed appearance on their behalf without authorization. Based on affidavit of said local counsel and withdrawal of opposition of respondent, the court authorized leave to withdraw notice of such appearance.

Respondent thereafter served petitioners, as individual defendants, with summons and a complaint in California under the Alaska long arm statute, AS 09.05.015(a).

Petitioners filed a pre-trial motion to quash service of summons on the basis that it was in violation of the due process clause of the Fourteenth Amendment of the United States Constitution. The motion was supported by affidavits of petitioners setting forth facts evidencing they had no minimum contact with the State of Alaska (Appendix D, page 7a and Appendix E, page 11a). The respondent offered no evidence to refute the affidavits.

The trial court denied petitioners' motion without stating any reason. A petition for review was filed with the Alaska Supreme Court, also on the basis that the service of summons on petitioners violated the due process clause of the Fourteenth Amendment of the United States Constitution. Petitioners also raised the issue that the Fourteenth Amendment placed the burden on the respondent to allege and prove the facts for *in personam* jurisdiction over petitioners.

REASONS FOR GRANTING WRIT

(1) Unless reversed, the decision of the Alaska court will demand that your petitioners make an election between permitting entry of a default judgment against them or, in the alternative, to submit themselves to extensive discovery and litigation regarding their religious convictions and their right to preach the same, which would, in and of itself, be a transgression of their rights under the United States Constitution regarding freedom and establishment of religion and freedom of speech. Counsel very respectfully suggests that it would constitute a transgression of law and logic to require the defendants to make this election before the issue of the state court's jurisdiction over their person is adjudicated by this court.

(2) The judgment of the Alaska court is in direct conflict with the decisions of this court construing the due process clause of the Fourteenth Amendment of the United States Constitution.

(3) This court has not heretofore determined the question of who has the burden, under the due process clause of the Fourteenth Amendment of the United States Constitution of alleging and proving jurisdictional facts for *in personam* jurisdiction under a state long arm statute.

ARGUMENT

The judgment of the Alaska Supreme Court is a "final" one for purposes of review by the court. *Rosenblatt* v. *American Cyanamid Company,* 15 L.Ed.2d 39, 42, 43, 86 S.Ct. 1, 3; *Local No. 438* v. *Curry,* 371 U.S. 542, 550, 9 L.Ed.2d 514, 520, 83 S.Ct. 531; *Mercantile Natl. Bank* v. *Langdeau,* 371 U.S. 555, 558, 9 L.Ed.2d 523, 526, 83 S.Ct. 520.

This court held in the case of *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 at page 316 that:

> ". . . due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not 'offend traditional notions of fair play and substantial justice.' "

In the case of *McNutt* v. *General Motors Acceptance Corp.,* 298 U.S. 178, this court stated that:

> "It is incumbent upon the plaintiff properly to allege the jurisdictional facts, according to the nature of the case." 298 U.S. at page 182.

Although the *McNutt* case specifically dealt with the necessary jurisdictional facts for diversity jurisdiction in federal court, the foregoing principle of law has been applied by federal appellate courts to place the burden on the plaintiff of alleging the necessary jurisdictional facts for jurisdiction over the person of the defendant, and, if said allegations be challenged, of establishing and sustaining said facts. *Taylor* v. *Portland Paramount Corporation,* 383 F.2d 634, 639 (9th Cir. 1967) and *Block Industries* v. *DHJ Industries, Inc.,* 495 F.2d 256, 259 (8th Cir. 1974).

As this court stated in the case of *Hanson* v. *Denckla,* 357 U.S. 235, 2 L.Ed.2d 1283:

> ". . . the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* v. *Neff,* 95 U.S. 714, 24 L.Ed. 565, to the flexible standard of *International Shoe Co.* v. *Washington,* 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 ALR 1057. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. (Cases cited) Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he had the 'minimal contacts' with that state that are a prerequisite to its exercise of power over him." 357 U.S. 250-251, 2 L.Ed.2d 1296.

The legal aspects of the decision are aggravated by the holdings that even "a greater degree of contacts" are necessary than for other tortious contact because the only activity charged against petitioners involves that of First Amendment considerations (*N.Y. Times Co.* v. *Conner,* 365 F.2d 567 (5th Cir. 1966); *Walker* v. *Savell,* 335 F.2d 536 (5th Cir. 1964)).

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alaska upon plenary

briefing and argument, or for such other relief as the court deems just.

Respectfully submitted,

RALPH K. HELGE
RADER, HELGE & GERSON
Grosvenor Plaza, Suite 540
150 South Los Robles Avenue
Pasadena, California 91101

and

DONALD A. BURR
BURR, PEASE & KURTZ, INC.
825 West Eighth Avenue
Anchorage, Alaska 99501

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3085

HERBERT W. ARMSTRONG and GARNER TED ARMSTRONG,
Petitioners,
v.
MARGARET E. AIKEN,
Respondent.

ORDER

(Filed October 15, 1976)

Upon consideration of the Petition for Review, By direction of the Court, IT IS ORDERED: The Petition for Review is denied.

DATED this 15th day of October, 1976.

Clerk of Supreme Court

By /s/ Fran Demmert
Chief Deputy Clerk

cc: Counsel, Justices

APPENDIX B

ALASKA STATUTES

Sec. 09.05.015. Personal jurisdiction. (a) A court of this state having jurisdiction over the subject matter has jurisdiction over a person served in an action according to the rules of civil procedure

(1) in an action, whether arising in or out of this state, against a defendant who, when the action is commenced,

(A) is a natural person present in this state when served;

(B) is a natural person domiciled in this state;

(C) is a domestic corporation; or

(D) is engaged in substantial and not isolated activities in this state, whether the activities are wholly interstate, intrastate or otherwise;

(2) in an action which may be brought under statutes of this state which specifically confer grounds for personal jurisdiction over the defendant;

(3) in an action claiming injury to person or property in or out of this state arising out of an act or omission in this state by the defendant;

(4) in an action claiming injury to person or property in this state arising out of an act or omission out of this state by the defendant, provided, in addition, that at the time of the injury either

(A) solicitation or service activities were carried on in this state by or on behalf of the defendant; or

(B) products, materials or things processed, serviced or manufactured by the defendant were used or consumed in this state in the ordinary course of trade;

(5) in an action which

(A) arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services in this state or to pay for services to be performed in this state by the plaintiff;

(B) arises out of services actually performed for the plaintiff by the defendant in this state, or services actually performed for the defendant by the plaintiff in this state if the performance in this state was authorized or ratified by the defendant;

(C) arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive in this state or to ship from this state goods, documents of title or other things of value;

(D) relates to goods, documents of title, or other things of value shipped from this state by the plaintiff to the defendant on his order or direction; or

(E) relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to the carrier occurred;

(6) in an action which arises out of

(A) a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or to protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this state;

(B) a claim to recover a benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated in this state either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

(C) a claim that the defendant return, restore, or account to the plaintiff for an asset or thing of value which was in this state at the time the defendant acquired possession or control over it;

(7) in an action to recover a deficiency judgment upon a mortgage note or conditional sales contract or other security agreement executed by the defendant or his predecessor to whose obligations the defendant has succeeded and the deficiency is claimed

(A) in an action in this state to foreclose upon real property situated in this state;

(B) following sale of real property in this state by the plaintiff; or

(C) following resale of tangible property in this state by the plaintiff;

(8) in an action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of the corporation while the defendant held office as a director or officer;

(9) in an action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority after April 10, 1968;

(10) in an action which arises out of a promise made to the plaintiff or some third party by the defendant to insure upon or against the happening of an event if

(A) the person insured was a resident of this state when the event out of which the cause of action is claimed to arise occurred;

(B) the event out of which the cause of action is claimed to arise occurred in this state; or

(C) the promise to insure was made in the state;

(11) in an action against a personal representative to enforce a claim against the deceased person represented if one or more of the grounds stated in (a) (2)—(10) of this section would have furnished a basis for jurisdiction over the deceased had he been living, and it is immaterial under this paragraph whether the action was commenced during the lifetime of the deceased;

(12) in an action for annulment, divorce or separate maintenance when a personal claim is asserted against the nonresident party, if

(A) the parties resided in this state in a marital relationship for not less than six consecutive months within the six years preceding the commencement of the action;

(B) the party asserting the personal claim has continued to reside in this state; and

(C) the nonresident party receives notice as required by law.

(b) In an action brought in reliance upon jurisdictional grounds stated in (a) (2)—(10) of this section, there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this section for personal jurisdiction over the defendant as to the claim or cause to be joined.

(c) The jurisdictional grounds stated in (a) (2)—(10) of this section are cumulative and in addition to any other

grounds provided by the common law. (§ 1 ch 87 SLA 1968; am § 1 ch 92 SLA 1972)

APPENDIX C

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 75-3410F

MARGARET E. AIKEN,
Plaintiff,

vs.

WORLDWIDE CHURCH OF GOD, a Non-Profit corporation, GARNER TED ARMSTRONG, HERBERT W. ARMSTRONG, WILLIAM GORDON, Individuals, John Doe One, John Doe Two and Jane Doe One,
Defendants.

ORDER DENYING DEFENDANTS GARNER TED ARMSTRONG AND HERBERT W. ARMSTRONG'S MOTION TO QUASH SERVICE OF SUMMONS

This matter having come before this Court and oral argument having been heard on August 4, 1976,

The motion of defendants Garner Ted Armstrong and Herbert W. Armstrong to quash service of summons is hereby DENIED. Without prejudice.

DATED this 2nd day of September, 1976.

/s/ Peter J. Kalamarides,
Judge of the Superior Court

APPENDIX D

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 75-3410F

MARGARET E. AIKEN,
Plaintiff,

vs.

WORLDWIDE CHURCH OF GOD, a Non-Profit corporation, GARNER TED ARMSTRONG, HERBERT W. ARMSTRONG, WILLIAM GORDON, Individuals, John Doe One, John Doe Two and Jane Doe One,
Defendants.

AFFIDAVIT OF HERBERT W. ARMSTRONG

State of California)
) ss.
County of Los Angeles)

I, HERBERT W. ARMSTRONG, of Pasadena, California, hereby affirm and state as follows:

(1) I have firsthand personal knowledge of the facts herein stated and could competently testify thereto, under oath, if called as a witness.

(2) I am now and for over twenty-five years prior to the filing of the above entitled action have been a resident of the City of Pasadena, County of Los Angeles, State of California.

(3) I am not and never have been a resident of the State of Alaska.

(4) On or about December 30, 1975, I was served with a summons and complaint in the above entitled action by personal service in the City of Pasadena, County of Los Angeles, State of California.

(5) I have never counseled with nor, to the best of my knowledge, had any personal contact or correspondence whatsoever with either Margaret E. Aiken, plaintiff in the above-entitled action, or Stuart J. Aiken.

(6) I have never personally considered or discussed the marital situation of Margaret E. Aiken or Stuart J. Aiken with either of them or, to the best of my knowledge, with any third person prior to the filing of the above-mentioned action.

(7) That I have never, by any means whatever, either directly or indirectly, ever advised or encouraged that Stuart J. Aiken leave Margaret E. Aiken.

(8) I am employed by the Worldwide Church of God and perform different duties, one of which has been to do radio and television programs in Pasadena, California, and, occasionally, other locations. That the copyright of the same is vested in the Worldwide Church of God, or one of its affiliated corporations, along with full control as to where the same are shipped for replay. Said radio and television programs were taped by the Worldwide Church of God and mailed to various stations for broadcasting and the tapes are not within my personal custody or control.

(9) I have never made a live radio or television broadcast, in Alaska.

(10) That I have never made a radio or television broadcast, in which I intentionally or knowingly encouraged anyone to separate from a spouse based upon the

former doctrinal teaching of the church, that once two parties were married in God's sight, that a divorce and remarriage by either one of them, as long as the original spouse was alive, would constitute adultery.

(11) That as an employee of the Worldwide Church of God one of my duties is to write articles. The copyright for the same is vested in the Worldwide Church of God, or one of its affiliated corporations, along with full control as to where the same are shipped. Any such articles are not printed in the State of Alaska.

(12) That I have never solicited membership in the Worldwide Church of God in Alaska, or anywhere else, as the same is contrary to the doctrinal position of the Church.

(13) That I do not now nor have I ever owned any real or personal property in the State of Alaska.

(14) That I am not now nor have I ever been employed in the State of Alaska.

(15) That I do not now nor have I ever had any income being generated from the State of Alaska.

(16) That I do not now nor have I ever carried on any personal business directly, or through an agent, in the State of Alaska. William Gordon is not my agent.

(17) My name does not now nor has it ever appeared in any telephone directory in Alaska.

(18) I do not now nor have I ever maintained any office or owned any vehicle in the State of Alaska, nor had an Alaskan driver's license.

(19) I do not now nor have I ever maintained any savings or checking accounts in the State of Alaska.

(20) The only times I have been in Alaska is when an aircraft in which I have been flying has landed in Alaska, which is approximately fourteen times, for the purpose of refueling or custom checks while traveling to or from California en route to or from a foreign country, during the course of my duties as an employee of the Worldwide Church of God.

Dated: June 28th, 1976.

/s/ Herbert W. Armstrong

State of California)
) ss.
County of Los Angeles)

I, HERBERT W. ARMSTRONG, state that I have read the foregoing affirmation by me subscribed and state that the same is true, both in substance and in fact, except as to those matters which I state to be of the best of my knowledge or based upon information and belief, and as to those matters I verily believe them to be true.

/s/ Herbert W. Armstrong

State of California)
) ss.
County of Los Angeles)

Subscribed and affirmed to before me this 28th day of June, 1976.

/s/ Oliver B. Nesmith
(Seal) Notary Public

APPENDIX E

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 75-3410F

MARGARET E. AIKEN,
Plaintiff,

vs.

WORLD WIDE CHURCH OF GOD, a Non-Profit corporation, GARNER TED ARMSTRONG, HERBERT W. ARMSTRONG, WILLIAM GORDON, Individuals, John Doe One, John Doe Two and Jane Doe One,
Defendants.

AFFIDAVIT OF GARNER TED ARMSTRONG

State of California)
) ss.
County of Los Angeles)

I, GARNER TED ARMSTRONG, of Pasadena, California, hereby affirm and state as follows:

(1) I have firsthand personal knowledge of the facts herein stated and could competently testify thereto, under oath, if called as a witness.

(2) I am now and for over twenty-five years prior to the filing of the above entitled action have been a resident of the City of Pasadena, County of Los Angeles, State of California.

(3) I am not and never have been a resident of the State of Alaska.

(4) On or about December 30, 1975, I was served with a summons and complaint in the above entitled action by personal service in the City of Pasadena, County of Los Angeles, State of California.

(5) I have never counseled with nor had any personal correspondence whatsoever with either Margaret E. Aiken, plaintiff in the above-entitled action, or Stuart J. Aiken.

(6) I have never personally considered or discussed the marital situation of Margaret E. Aiken or Stuart J. Aiken with either of them or, to the best of my knowledge, with any third person prior to the filing of the above-mentioned action.

(7) That I have never, by any means whatever, either directly or indirectly, ever advised or encouraged that Stuart J. Aiken leave Margaret E. Aiken.

(8) I am employed by the Worldwide Church of God and perform different duties, one of which is to do radio and television programs in Pasadena, California, and, occasionally, other locations. That the copyright of the same is vested in the Worldwide Church of God, or one of its affiliated corporations, along with full control as to where the same are shipped for replay. Said radio and television programs are taped by the Worldwide Church of God and mailed to various stations for broadcasting and the tapes are not within my personal custody or control.

(9) That I have never made a radio or television broadcast, in which I intentionally or knowingly encouraged anyone to separate from a spouse based upon the former doctrinal teaching of the church, that once two parties were married in God's sight, that a divorce and remarriage by either one of them, as long as the original spouse was alive, would constitute adultery.

(10) I have never made a live radio or television broadcast in Alaska.

(11) That as an employee of the Worldwide Church of God one of my duties is to write articles. The copyright for the same is vested in the Worldwide Church of God, or one of its affiliated corporations, along with full control as to where the same are shipped. Any such articles are not printed in the State of Alaska.

(12) That I have never solicited membership in the Worldwide Church of God in Alaska, or anywhere else, as the same is contrary to the doctrinal position of the Church.

(13) That I do not now nor have I ever owned any real or personal property in the State of Alaska.

(14) That I am not now nor have I ever been employed in the State of Alaska.

(15) That I do not now nor have I ever had any income being generated from the State of Alaska.

(16) That I do not now nor have I ever carried or any personal business directly, or through any agent, in the State of Alaska. William Gordon is not my agent.

(17) My name does not now nor has it ever appeared in any telephone directory in Alaska.

(18) I do not now nor have I ever maintained any office or owned any vehicle in the State of Alaska, nor had an Alaskan driver's license.

(19) I do not now nor have I ever maintained any savings or checking accounts in the State of Alaska.

(20) I have been in Alaska on only two occasions for approximately six days each time, on hunting trips.

The approximate dates of said hunting trips were April, 1974 and October, 1974. On the occasion of the first hunting trip, I also preached a sermon at the local Sabbath services of the Worldwide Church of God in Anchorage, but said sermon did not concern the former doctrinal teaching of the Church in regard to marriage and divorce.

Executed this 7th day of June, 1976, at Pasadena, California.

/s/ Garner Ted Armstrong

State of California)
) ss.
County of Los Angeles)

I, GARNER TED ARMSTRONG, state that I have read the foregoing affirmation by me subscribed and state that the same is true, both in substance and in fact, except as to those matters which I state to be of the best of my knowledge or based upon information and belief, and as to those matters I verily believe them to be true.

/s/ Garner Ted Armstrong

State of California)
) ss.
County of Los Angeles)

Subscribed and affirmed to before me this 7th day of June, 1976.

/s/ Larry W. Darden
(Seal) Notary Public

Supreme Court, U. S.
FILED
DEC 22 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-725

HERBERT W. ARMSTRONG AND GARNER TED ARMSTRONG,
Petitioners,

vs.

MARGARET E. AIKEN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL B. BAER
PAUL B. BAER AND ASSOCIATES
501 West Northern Lights Blvd.
Suite 201
Anchorage, Alaska 99503
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 2

Reason for Denying Writ 3

Argument 3

Conclusion 5

Appendix A—Excerpt From Transcript of Hearing on Defendant Armstrong's Motion to Quash Service of Summons 1a

Table of Authorities

CASES

Department of Banking, State of Nebraska v. *Pink*, 317 U.S. 264, 87 L.Ed. 254, 63 S.Ct. 233 3

Local No. 438 v. *Curry*, 371 U.S. 542, 9 L.Ed.2d 514, 83 S.Ct. 531 4

Market Street Railway Co. v. *Railroad Commission*, 324 U.S. 548, 89 L.Ed. 1171, 65 S.Ct. 770 3

Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69, 91 L.Ed. 80, 67 S.Ct. 156 3

Rosenblatt v. *American Cyanamid Company*, 15 L.Ed. 2d 29, 86 S.Ct. 1 4

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-725

HERBERT W. ARMSTRONG AND GARNER TED ARMSTRONG,
Petitioners,

vs.

MARGARET E. AIKEN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARGARET E. AIKEN, respondent, respectfully submits the following brief in opposition to the petition for certiorari to the Supreme Court for the State of Alaska filed on November 23, 1976.

QUESTIONS PRESENTED

The questions presented for review by petitioners would be more accurately phrased as follows:

(1) When a complaint fails to allege facts that certain defendants had any contact with the State of Alaska, and those defendants submit affidavits stating they have no minimum contact, and the plaintiff has not had an opportunity to engage in discovery to refute such affidavits, has the Alaska court, by denying without prejudice a motion

to quash service of summons, applied the Alaska long arm statute in violation of the Fourteenth Amendment to the United States Constitution and the decisions of this court construing the same?

(2) Does the plaintiff have a burden, under the due process clause of the Fourteenth Amendment to the United States Constitution, of alleging in the complaint jurisdictional facts for *in personam* jurisdiction under a state long arm statute?

(3) Does the due process clause of the Fourteenth Amendment to the United States Constitution prevent the plaintiff from engaging in discovery procedures with the defendant-petitioners prior to proving the requisite facts for *in personam* jurisdiction?

STATEMENT OF THE CASE

Petitioners' statement of the case contains the following inaccuracies and omissions:

(1) Petitioners state that the respondent served petitioners with a summons and complaint after withdrawal of their notice of appearance. In fact, the respondent served petitioners with notices to absent defendant and complaints prior to such withdrawal.

(2) Petitioners state that the trial court denied their motion without stating any reason. While it is true the judge did not state a reason in his order, he did state from the bench his reason for denying the motion, to-wit: this is a matter of law which arises from matters of fact and should be safeguarded until trial where the facts can be brought out under oath (Appendix "A" page 2a). He then reserved decision on the motion and later denied it without prejudice.

REASON FOR DENYING WRIT

The decision of the Alaska Supreme Court is not final because the decision of the Superior Court was rendered without prejudice, the judge stating from the bench that the motion to quash service of summons should properly be safeguarded until a time when the facts can be brought out under oath (Appendix "A" pages 2a-3a). The effect of the decision of the Superior Court and the denial of the petition for review by the Alaska Supreme Court is nothing more than to allow the respondent to engage in a discovery program with the petitioners in order to determine facts heretofore available only to the petitioners which are relevant to the issue of *in personam* jurisdiction.

ARGUMENT

The decision of the Alaska Supreme Court is not a "final judgment" which would be a proper subject for review by this Court. It was not an effective determination of the litigation and no rights were adjudicated, the trial court stating words to the effect that it could not properly decide the issue of *in personam* jurisdiction on its merits without evidence given under oath, and then denying the motion without prejudice. It does not meet the test of finality set forth in the following decisions of this Court: *Department of Banking, State of Nebraska* v. *Pink*, 317 U.S. 264, 268, 87 L.Ed. 254, 63 S.Ct. 233, 235; *Market Street Railway Co.* v. *Railroad Commission*, 324 U.S. 548, 551, 89 L.Ed. 1171, 65 S.Ct. 770, 773; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 91 L.Ed. 80, 67 S.Ct. 156.

The cases cited by the petitioners as authority for the position that the decision of the Alaska Supreme Court is a "final judgment" are distinguishable from the present case in two crucial respects.

The Court, in discussing the circumstances under which the state court's decision is considered a "final judgment" and properly reviewable, stated in *Rosenblatt* v. *American Cyanamid Company*, 15 L.Ed.2d 29, 42, 43, 86 S.Ct. 1, 3:

> Here, as in Curry [*Local No. 438* v. *Curry*, 371 U.S. 542, 9 L.Ed.2d 514, 83 S.Ct. 531] there has been: (1) a final assertion of jurisdiction, with no further review of that issue possible in the state courts; (2) a threat of serious erosion of national policy (here the due process right against subjection to excessive state assertions of *in personam* jurisdiction); and (3) a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case.

In the case at bar, there has been no final assertion of jurisdiction. The petitioners may raise the issue again after the jurisdictional facts are established through discovery. The issue of *in personam* jurisdiction was raised prematurely by the petitioners in the Superior Court, as there was not a sufficient basis upon which that Court could make the necessary factual determinations to decide this issue on its merits.

In addition, the issue of *in personam* jurisdiction is "enmeshed in the factual controversies" of the case at bar. Many of the questions that the respondent will seek to answer through discovery concerning jurisdiction are the same questions which bear upon the petitioners' liability for alienation of the affections of the respondent's husband. Examples of these questions are who has control over the distribution to Alaska of the petitioners' radio and television programs, and who authored and authorized certain pieces of literature which discuss the teachings of the Worldwide Church of God regarding "scriptural divorce".

CONCLUSION

For the foregoing reasons, respondent respectfully prays that the petition for a writ of certiorari to the Supreme Court of the State of Alaska be denied.

Respectfully submitted,

PAUL B. BAER
PAUL B. BAER AND ASSOCIATES
501 West Northern Lights Blvd.
Suite 201
Anchorage, Alaska 99503
Attorneys for Respondent

APPENDIX

APPENDIX A

IN THE
SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 75-3410

MARGARET AIKEN,
Plaintiff,
vs.
WORLD WIDE CHURCH OF GOD, et al,
Defendants.

VOLUME I

TRANSCRIPT OF HEARING ON DEFENDANT ARMSTRONG'S MOTION TO QUASH SERVICE OF SUMMONS (TAKEN UNDER ADVISEMENT) (EXCERPT)

BEFORE THE HONORABLE PETER J. KALAMARIDES
Superior Court Judge
Anchorage, Alaska
August 4, 1976
9:00 o'clock a.m.

APPEARANCES:

FOR THE PLAINTIFF:

Paul B. Baer
Attorney at Law
501 West Northern Lights
Anchorage, Alaska

FOR THE DEFENDANTS:

Donald A. Burr
Attorney at Law
825 West Eighth Avenue
Anchorage, Alaska

B-1037

1783

PROCEEDINGS

1783

(This portion not requested)

1924

THE COURT: All right. Now, I want to hear the argument as to jurisdiction on matters of law. Because the matters of law which arise out of the matters of fact are ordinarily safeguarded until trial. Because at that time we have the facts drawn out under oath.

1927

(This portion not requested)

1998

THE COURT: At first glance it would appear that these—this matter is a matter of law arising out of a matter of fact, but I'm not going to make that determination at

this time. I'm going to reserve decision in this matter for a few days, I'm going to review and look back again what the concept that was brought up at this particular oral argument. I want to thank you gentlemen for your assistance. I'll let you know just as quickly as possible. If there's nothing further, we'll stand in recess.

THE CLERK: Please rise. Court stands at recess.

(Court recessed)

2000

END OF REQUESTED PORTION

CERTIFICATE

SUPERIOR COURT)
) ss.
STATE OF ALASKA)

I, Roma L. Akulaw, court reporter for the third judicial district, state of Alaska, hereby certify:

That the foregoing pages numbered 1 through 2 contain a full, true and correct transcript of proceedings in cause no. 75-3410, Margaret Aiken versus World Wide Church of God, et al, third district, transcribed by me to the best of my knowledge and ability from third judicial district Akai recorder tape identified as follows:

Tape No. B-1037 Log Nos. 1924-1927
Log Nos. 1998-2000

DATED at Anchorage, Alaska, this 9th day of December, 1976.

Signed and Certified to by:

/s/ Roma L. Akulaw
Roma L. Akulaw
Court Reporter

(Seal)